IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14577

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

F. W. WOOLWORTH CO.,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT, F. W. WOOLWORTH CO.

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September, 1955.

THE SORG PRINTING CO., INC., 80 SOUTH ST., NEW YORK 38, N. Y. 105

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The purpose of this supplement is to invite the Court's attention to the decision of the National Labor Relations Board, rendered on August 26, 1955, in *International News Service* v. *American Newspaper Guild.*[1] That case, like the instant case, raises questions as to the nature and extent of the right of unions to demand from employers information as to merit wage increases.

In the cited case, as in the case at bar, when the agreement was signed, it contained a reservation to the employer of the exclusive prerogative to grant merit wage increases.

As in the case at bar, where the union asserted that the information was needed "for the intelligent and equitable

1. 113 NLRB No. 130. The principal, concurring and dissenting opinions of the members of the Board are printed in the appendix hereto.

administration of the agreement,'' the union had requested specific and detailed information encompassing merit wage increases granted by the employer, stating that the request was made ''in order to police the existing contract, bargain intelligently, and evaluate properly our own and management's wage proposals.''

In this recent decision of the Board, it is held, contrary to the holding in the instant case, that by signing an agreement reserving to the employer the exclusive prerogative of granting merit increases, the union lost any right to demand the requested information.[2]

The dissenting members of the Board point out that this decision is in specific and basic conflict with the prior decisions of the Board and the Courts on the question at issue.

The dissenting members of the Board in referring to the decisions handed down ''in the twenty years since the Board was first established''[3] also emphasize the Respondent's argument, namely, that the Board, and in many instances the Courts, have based their reasoning to support the holding that employers must furnish such data to the unions on old Wagner Act cases without in any way noting the changes in the National Labor Relations Act brought about in 1947 when the Taft-Hartley Act was enacted.[4]

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2. The principle of the cited case is that ". . . it would be an abuse of the Board's mandate to throw the weight of government sanction behind the union's attempt, some three months later, to disturb the terms of the bargain the parties themselves achieved. The give-and-take of the bargaining table is undoubtedly a better place than the Board's offices for resolving disputes as to the type and amount of informational data parties to collective bargaining contracts must give to each other. Where, as here, the parties have themselves decided the issue at the bargaining table, the issue has been taken away from the Board and there is no need for it to interfere. To hold otherwise is to encourage one party to a bargaining agreement to resort to the Board's processes to upset the terms of a contract which the other parties to the agreement had every good reason to believe had been stabilized for a definite period." P. 11 of Appendix of Supplemental Brief.

3. Page 19 of Appendix of Supplemental Brief.

4. Pages 9 to 14, inclusive, of Respondent's Main Brief.

Respondent does not argue that this Honorable Court should follow this recent apparent change in the Board's policy as illustrated by the *International News Service* case in "weather vane" fashion. However, Respondent does believe that this complete reversal of previous Board decisions is of sufficient importance that the entire decision be printed and supplied to the Court in the attached Appendix.

Respondent argues that the minority opinion is correct in asserting that the majority in reaching their decision have departed from precedent. They have, and they should concede that they have.

It is respectfully submitted that the Board's petition should be dismissed and its order vacated and set aside.

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September, 1955.

[Appendix Follows]

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL NEWS SERVICE DIVISION OF THE HEARST CORPORATION

and Case No. 2-CA-3507

AMERICAN NEWSPAPER GUILD, CIO

INTERNATIONAL NEWS PHOTOS DIVISION OF THE HEARST CORPORATION

and Case No. 2-CA-3508

AMERICAN NEWSPAPER GUILD, CIO

DECISION AND ORDER

On October 18, 1954, Trial Examiner Max M. Goldman issued his Intermediate Report in the above-entitled consolidated proceedings finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent has not violated the Act in certain other respects and recommended dismissal of the complaint insofar as it contains allegations concerning such violations. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief, and the Union filed a reply brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Trial Examiner found that the Respondent violated Section 8 (a) (5) of the Act by refusing to comply with the Union's request for information showing, among other things, the specific salaries of the Respondent's employees and the amounts of merit increases the respective employees had been given. In addition to other arguments, the Respondent contends that the Union waived whatever right it may have had to receive this information by negotiating and signing its 1953-1955 bargaining agreement with the Respondent. We agree with this contention.

For a number of years, the Union has been the collective bargaining representative of employees in the Respondent's International News Service and International News Photos Divisions. In this capacity, the Union has negotiated a series of bargaining agreements covering these employees. These contracts did not provide for the payment of fixed wages and salaries. Instead, the contracts established a series of minimum rates, with each contract providing that merit increases, that is wages and salaries above the required minima, would be arrived at by negotiation between the Respondent and individual employees. This was the general scheme of the parties' contract that was effective from April 1952 to April 21, 1953. That contract included a clause, Article II, that required the Respondent to furnish the Union with a list of the employees covered, together with their experience ratings and classifications.[1]

In April 1953, the parties began to negotiate the renewal of their 1952-1953 agreement. At the first session, on April 27, the Union presented a mimeographed document containing specific proposals for the new contract, including a proposal to continue the schedule of minimum rates. The

1. Article II of the 1952-1953 contract states. "Within fifteen days after the signing of this contract, the employer agrees to supply to the Guild a list of employes by bureaus who are governed by the terms of this contract, with experience rating, classifications and their designation as permanent or replacement employes. Additions to or subtractions from this list will be supplied monthly to the Guild."

Union proposed, however, a change in the practice with respect to merit increases, proposing that it be given "the right to bargain on individual merit increases," and that "The Employer shall inform the Guild of all merit increases granted in accordance with the provisions of Article IV." By Article IV, the union proposed that instead of the above described Article II of the 1952-1953 contract, the following clause be substituted:

1. Within 15 days after the signing of this contract the Employer shall supply the Guild with a list containing the following information for all employees then on the payroll:
    (a) Name, address and telephone number.
    (b) Date of hiring.
    (c) Classification.
    (d) Experience rating and experience anniversary.
    (e) Salary, including a description of commission or bonus arrangements.
2. The Employer shall notify the Guild monthly in writing of:
    (a) All merit increases granted by name of the employe, individual amount, and effective date.
    (b) Step-up increases paid by name of the employe, individual amount, and effective date.
    (c) Changes in classification and any salary changes by reason thereof.
    (d) Resignations, retirements, deaths and any other revisions in the data listed in Section 1.
3. Within one week after the hiring of a new employe the Employer shall furnish the Guild in writing with the data specified in Section 1 for each such new employe.

In bargaining conferences that followed the April 27 meeting, the parties were unable to agree on the terms of

a new contract. A Federal Mediator was thereupon called in, and on May 20, in the latter's presence, the parties discussed the Union's proposed information clause. On May 22, the Union, acting at the Mediator's suggestion, prepared a written list of the contract subjects that the Union considered of primary importance, and those that it considered to be of lesser significance. Listed in the first category of 7 subjects, that is items of greatest weight and priority, were such disputed matters as "Grievance Procedure," "Minimum Wages," and "Severance Pay." The subject of "Information" was listed in the second category of 16 subjects, that is items of lesser weight, which included the subjects of "Preamble" and "Miscellaneous." Also on May 22, again at the Mediator's suggestion, the parties designated a two-man subcommittee, composed of Thomas R. Breslin for the Respondent, and Stephen Ripley for the Union, to continue the negotiations.

At the second meeting of the subcommittee, on June 1, Ripley agreed to abandon the Union's original proposal with respect to the furnishing of information, and to include in the new contract the above-described Article II of the 1952-1953 contract with the addition of a requirement that the Respondent would furnish the Union with the employees' addresses and experience anniversary dates. The subcommittee met again on June 8, but did not discuss the "information" matter. On June 9, the subcommittee reported to the Mediator, and listed the items as to which agreement had not been achieved. These were chiefly items that had appeared on the Union's May 22 list of priority items. The subject of "information" was not reported as an item then in dispute. On June 12, after approximately 20 meetings, the parties reached complete agreement on the terms of a new contract.

This contract, effective from April 21, 1953, to April 21, 1955, followed the scheme of the earlier agreements,

in that it established a series of minimum rates. It also reflects the Union's abandonment of its initial proposal on merit increases, for, like its predecessors, the 1953-1955 contract provides that merit increases shall be arrived at by negotiation between the Respondent and the individual employees. As executed, the 1953-1955 contract contains the "information" clause agreed upon by the negotiating subcommittee on June 1.[2]

Explaining the negotiations between himself and Breslin, Ripley testified that the Union abandoned its original proposal because "we were entitled to the information anyway legally." He testified that the Union conveyed the idea to the Respondent that the Union "could go to the National Labor Relations Board, or court, or wherever we had to go to get it." However, he could not recall specifically when, or to whom, such a statement was made in the course of the bargaining negotiations. Breslin testified that when Ripley agreed to the abandonment of the Union's original "information" proposal, Ripley made it clear that he was so doing because "this information was not essential or vital to the Guild." Breslin categorically denied that he or, as far as he knew, any other representative of the Respondent was told during formal bargaining session that the Union was abandoning its proposal because it was believed that legal procedure could be invoked to get the information.

As the Trial Examiner found, the Respondent complied with the 1953-1955 contract by supplying the Union with all the information that was required by the above-

2. Article III of the 1953-1955 contract provides:

Within fifteen days after the signing of this contract, the employer agrees to supply to the Guild a list of employes by bureaus who are governed by the terms of this contract, with address, experience anniversary, experience rating, classifications and their designation as permanent or replacement employes. Additions to or subtractions from this list will be supplied monthly to the Guild. Within two weeks after the hiring of a new employe, the employ shall furnish the Guild with the foregoing data.

described Article III of its terms. Nevertheless, on September 9, 1953, the Union requested the Respondent to furnish the following information:

1. The name of each employe, listed by job title and department.
2. His salary, and the dates and amounts of any regular commissions and bonuses paid him during the past year.
3. The years of experience credited to him.
4. His length of service with the company.
5. His date of hiring and anniversary date.
6. The dates and amounts of any merit increases paid him during the past year.
7. Details of the formulas used in the computation and payment of commissions, bonuses and merit increases.

The Union wrote that its request was being made "in order to police the existing contract, bargain intelligently, and evaluate properly our own and management's wage proposals." The Respondent refused the Union's request, pointing out that no grievances had been filed and that no wage proposals were then pending.

Although the Board has said repeatedly that statutory rights may be waived by collective bargaining,[3] it has also said that such a waiver will not readily be inferred. It has thus required that there be "a clear and unmistakable showing" that the waiver occurred.[4] On the facts of this case we hold that the Union "clearly and unmistakably"

3. See, for example, *Shell Oil Company, Incorporated*, 77 NLRB 1306 (right to strike); *Tidewater Associated Oil Company*, 85 NLRB 1096, 1098 (right to bargain concerning a pension plan); *Shell Oil Company*, 93 NLRB 161, 164 (right to negotiate grievances); *E. W. Scripps Company*, 94 NLRB 227, 228 (right to bargain concerning merit increases).

4. *Tidewater Association Oil Company, supra.* See also *E. W. Scripps Company, supra; California Portland Cement Company*, 101 NLRB 1436, 1438-1439; *Hekman Furniture Company*, 101 NLRB 631, 632.

bargained away any right it had to receive the information it requested on September 9.[5]

What the Union asked for on September 9 was almost precisely the portion of its May 27 information proposal that the Respondent had refused to assent to, and which the Union had, in fact, abandoned, in the course of the bargaining negotiations for the 1953-1955 contract. Some 20 bargaining sessions had been required before the parties had reached agreement on the terms of that contract. During several of those sessions, the parties had addressed themselves to the Union's "information" proposal, and the Union clearly revealed that it attached less importance to that proposal than it did to other matters in issue. It is significant, too, we think that not only did the Union in the course of the bargaining abandon its original "information" proposal, but it also abandoned its original proposal that it be accorded the right to bargain on individual merit increases. For, as the factual recital above shows, the Union related its proposal that it be given information on individual merit increases with its proposal that it be consulted on the granting of such increases. Thus, the Union's abandonment of the latter proposal gives a cogent reason for the relatively less weight the Union attached to its "information" proposal than to other subjects, and, indeed, tends to indicate the reason for its ultimate abandonment.

But on the facts before the Board, what the reason was that motivated the Union—whether it was because it abandoned its merit increase proposal, or whether it was, as Ripley testified, because the Union believed that legal sanction could be invoked to procure what it was seeking, or whether it was for some other reason not shown in the record—we need not here decide. Nor need we decide

5. See *General Controls Company*, 88 NLRB 1341, 1342; *Hughes Tool Company*, 100 NLRB 208, 209; *Avco Manufacturing Corporation*, 111 NLRB No. 118, pp. 2-5.

whether or not the Union's September 9 request was revelant or necessary for the reasons it advanced when it made the request. For the controlling fact that clearly emerges from the entire course of the parties' bargaining is that the Union, having proposed an "information" clause for the 1953-1955 contract more inclusive than the one in the 1952-1953 contract, consciously yielded in the face of the Respondent's objections, and accepted something less than it originally proposed. What the parties ultimately agreed upon, moreover, was the "information" clause of the 1952-1953 contract modified to include a part of the Union's original proposal. And this agreement was in fact written into the express terms of the bargaining contract the parties executed.

In these circumstances, we believe it would be an abuse of the Board's mandate to throw the weight of Government sanction behind the Union's attempt, some three months later, to disturb the terms of the bargain the parties themselves achieved. The give and take of the bargaining table is undoubtedly a better place than the Board's offices for resolving disputes as to the type and amount of informational data parties to collective bargaining contracts must give to each other. Where, as here, the parties have themselves decided the issue at the bargaining table, the issue has been taken away from the Board and there is no need for it to interfere. To hold otherwise is to encourage one party to a bargaining agreement to resort to the Board's processes to upset the terms of a contract which the other party to the agreement had every good reason to believe had been stabilized for a definite period.[6]

Members Murdock and Peterson state in their dissent that, in reaching our decision herein, we have departed from precedent. We have not. The issue of whether there

6. See Chairman Herzog's concurring opinion in *The Jacobs Manufacturing Company*, 94 NLRB 1214, 1227-1228.

has been "a clear and unmistakable" waiver is necessarily a question of fact that can be decided only upon the specific facts of the particular case. Like our dissenting colleagues we have read and carefully analyzed and compared the cases cited by them in their dissent. In our considered judgment, each of those cases is factually distinguishable from the instant case. No case relied upon by Members Murdock and Peterson involved a situation, as here, in which it was shown that the parties not only bargained *pro* and *con* with respect to an information clause, but also, having come to terms on the matter, inserted in their contract, not what one party originally sought, but a measure that compromised their differences. It follows, therefore, that the cases relied upon by Members Murdock and Peterson cannot be controlling here.

Accordingly, as it appears that the Respondent supplied the information to which the Union could lay claim under the 1953-1955 contract, and as a majority of the Board so agrees, we shall dismiss the complaints against the Respondent.

ORDER

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaints herein against International News Service and International News Photos Divisions of the Hearst Corporation be, and they hereby are, dismissed.

Dated, August 26, 1955, Washington, D. C.

GUY FARMER, *Chairman*

PHILIP RAY RODGERS, *Member*
NATIONAL LABOR RELATIONS BOARD

Boyd Leedom, *Member,* concurring:

I concur that the complaints should be dismissed but I do not believe it is necessary to reach the problem of waiver.

Considering the time of the demand for the information, with respect to the wage reopening provision of the contract, and the failure to establish specific need for the data, in the absence of apparent necessity at the time of the request, I would dismiss. Lacking such a showing, the Employer's failure to supply information is not failure to bargain in good faith.

Dated, August 26, 1955, Washington, D. C.

Boyd Leedom, *Member*

National Labor Relations Board

Abe Murdock and Ivar H. Peterson, *Members,* dissenting:

In these cases Chairman Farmer and Member Rodgers, with the concurrence of Member Leedom, have decided that this Employer did not violate Section 8 (a) (5) of the Act by refusing to furnish a Union with wage data concerning the employees it represents. In so deciding they have deprived this Union of necessary and relevant information essential to the intelligent representation of these employees. For the first time in the history of Board and court decisions in this area of labor relations, the assertion is made that to require the employer to furnish more information than the amount specified in a contract would be "an abuse of the Board's mandate." According to Chairman Farmer and Member Rodgers, the "give and take of the bargaining table" is a "better place than the Board's offices" to resolve disputes of this nature. Indeed, they hold that where the parties have contracted concerning informational data "the issue has been taken away

from the Board and there is no need for it to interfere." These conclusions are not only novel; in our opinion, they present a basic misconception of the Board's function in administering this Act. Is it an abuse of the Board's mandate to require an employer to furnish a union with information which the latter finds essential to effectively exercise its duty of representing employees under Section 9 (a) of the Act? In other cases Chairman Farmer[7] and Member Rodgers[8] themselves have described to the Board and Court established rule that it is the obligation of an employer to furnish such information to a Union to make collective bargaining effective. Did the Board abuse its mandate in those cases too? Why were the employers in these cases ordered to furnish the requested information if the bargaining table was the better place to resolve those disputes? Why should the Board have interfered there, but not here? Chairman Farmer and Member Rodgers are saying, in effect, to this Union: "You now have half the tools you need to carry out your obligations to these employees. You did not successfully insist at the bargaining table, a better place than the Board's offices, that you be given all of them; it is therefore your own fault and not the Board's if you cannot represent these employees effectively."

It has been the consistent position of the Board and the courts that the furnishing of wage information to a Union is a *prerequisite* to effective collective bargaining. Certainly, it is the business of this Board to see to it that the Union be furnished this data, which is in the employer's possession and can be supplied without the imposition of an unreasonable or undue burden. Otherwise the Board will have failed to carry out the Congressional mandate to foster

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7. *Boston Herald-Traveler Corporation*, 110 NLRB 2097, enforced 223 F. 2d 58 (C. A. 2); *Whitin Machine Works*, 108 NLRB 1537, enforced 217 F. 2d 593 (C. A. 4), cert. denied 349 U.S. 905; *The Item Company*, 108 NLRB 1634, enforced 220 F. 2d 956 (C. A. 5).

8. *Utica Observer-Dispatch, Inc.*, 111 NLRB No. 6; *Whitin Machine Works, supra; The Item Company, supra.*

and encourage collective bargaining. In our view, this mandate does not permit the Board to stand by with arms folded and solemnly declare that there is "no need to interfere" when one of the parties is crippled by the absence of information without which it cannot fulfill its role in collective bargaining.

To support their finding that the Employer did not violate Section 8 (a) (5) of the Act, Chairman Farmer and Member Rodgers hold that the Union "bargained away" or "abandoned" its right to this information in the course of negotiating and executing a contract. The extended discussion of the parties' negotiations for a new contract in 1953, which appears in their decision, reveals that the Union originally requested complete informational data, but finally executed a contract in which the Employer agreed to furnish the Union with some but not all of such data. Chairman Farmer and Member Rodgers concede that there is some evidence in the record that the Union did not insist that the Employer agree to furnish all the information because it believed that the Employer was legally obligated to furnish such information, whether or not the contract so provided. There is, in addition, evidence in the record, contrary to the suggestion of Chairman Farmer and Member Rodgers, that the Union's position as to this issue was specifically made known to the Employer. Stephen Ripley, a Union negotiator, testified that he had submitted a brief to Federal Mediator Bernard J. Forman, which set forth the Union's position that it had a legal right to such information. On cross-examination Respondent's negotiator, Thomas J. Breslin, admitted that he had read the Union's brief at the time it was presented to the mediator and that he was therefore aware of the Union's position that it had a right, apart from any contractual agreement, to be provided with the desired information.

The Board and the courts have uniformly recognized that to deny a union information necessary to its role as

bargaining representative would create a serious impediment to the processes of collective bargaining.[9] Such a right has been held to be statutory in nature,[10] deriving from the union's authority under Section 9 (a) of the Act to represent employees and the employer's corollary duty under Section 8 (a) (5) to engage in good faith collective bargaining. Numerous defenses, including the argument that the Union had "waived" its right to such information, have been rejected time and again.[11] The Board has held, with judicial approval, that any purported waiver by a union of so important and necessary a right must be a "specific" waiver in language "clear and unmistakable" or "clear and unequivocal."[12] Chairman Farmer and Member Rodgers, however, find solely on the basis of the execution of a contract containing an agreement that the employer would furnish less information than was originally requested, that the union "clearly and unmistakably" waived its right to the additional necessary information. Obviously they would substitute what at best is an implied waiver from silence or ambiguous conduct for the judicially approved doctrine that nothing less than a "clear and unequivocal" waiver will suffice. We believe that this decision is on its face wrong.

Our view that there was no clear waiver in this case is supported by the decisions of numerous Circuit Courts of

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9. *Utica Observer-Dispatch, Inc., supra; Boston Herald-Traveler Corporation, supra; The Item Company, supra; Whitin Machine Works, supra; Leland-Gifford Company,* 95 NLRB 1306, enforced 200 F. 2d 620 (C. A. 1); *Yawman & Erbe Manufacturing Company,* 89 NLRB 881, enforced 187 F. 2d 947 (C. A. 2); *N.L.R.B. v. J. H. Allison & Company,* 165 F. 2d 766 (C. A. 6), cert. denied 335 U. S. 905.

10. *N.L.R.B. v. The Item Company, supra; N.L.R.B. v. Yawman & Erbe Manufacturing Company, supra; California Portland Cement Company,* 101 NLRB 1433, 1439.

11. *Utica Observer-Dispatch, Inc., supra; Post Publishing Co.,* 102 NLRB 648; *Hastings & Sons Publishing Company,* 102 NLRB 708; *Hekman Furniture Co.,* 101 NLRB 631, enforced 207 F. 2d 561 (C. A. 6); *N.L.R.B. v. Leland-Gifford Co., supra.*

12. *N.L.R.B. v. The Item Company, supra; California Portland Cement Company, supra; Tide Water Associated Oil Company,* 85 NLRB 1096; *E. W. Scripps Company,* 94 NLRB 227; *General Controls Co.,* 88 NLRB 1341.

Appeal. Rejecting a similar contention, the Sixth Circuit Court of Appeals held in the *Allison* decision:

> Nor do we see logical justification in the view that in entering into a collective bargaining agreement for a new year, even though the contract was silent upon a controverted matter, the union should be held to have waived any rights secured under the Act, including its right to have a say-so as to so-called merit increases. Such interpretation would seem to be disruptive rather than fostering in its effect upon collective bargaining, the national desideratum disclosed in the broad terms of the first section of the National Labor Relations Act.

In *N.L.R.B. v. Otis Elevator Company,*[13] the Second Circuit Court of Appeals set forth a contractual provision in which the employer agreed to furnish specific information relating to time study statistics. The Court then held as follows:

> Respondent . . . contends that this sets forth his entire obligation to impart information and constitutes a waiver of any additional union right. We cannot agree. In the atmosphere of collective bargaining in labor relations it is reasonable to require that the parties set forth the terms on which they have agreed. But *the drawing of broad inferences of waiver from their silence would be disruptive rather than fostering amicable relations.* [Citing *N.L.R.B. v. J .H. Allison Company, supra.*] The language quoted from the contract carries the implication of a general intent to keep the operator informed as to the development of time studies affecting him. In the absence of an express provision this should not be read as limiting requests on behalf of the employees for information, but rather as in general supporting them. We think, therefore, that the general principle of free access to information relevant to bargainable issues must apply. (Emphasis supplied.)

13. 208 F. 2nd 176 (C. A. 2).

In the *Leland-Gifford* case[14] the Union, as in the instant cases, had requested complete data for bargaining purposes and was supplied by the Company with something less in contract form. In that case the parties had even included a clause in the contract to the effect that the agreement represented the entire agreement between the parties, as indicated below. Nevertheless, the Board held:

> The Respondent's contention that the Union bargained away the right to request the individual wage data is apparently based on the fact that *the 1948 contract contained provisions requiring the disclosure by the Respondent of certain information* (not including that in issue here), and a further clause which stated, "This agreement contains the entire agreement between the parties and no matters shall be considered which are covered by the written provisions stated herein." We need not decide, as the Trial Examiner did, whether this clause was operative during the period in 1950 covered by the complaint herein, for we are satisfied that, in any event, the *clause in question was not intended, and cannot be construed, as a waiver by the Union of its right to obtain data* necessary to the effective administration of a contract. (Emphasis supplied except on phrase "right to obtain data.")

The First Circuit Court of Appeals,[15] finding that the Respondent's duty to furnish information under the circumstances of that case did not "require extended consideration," enforced this portion of the Board's Order, citing numerous precedents. Again in *N.L.R.B. v. Yawman & Erbe Manufacturing Company*[16] the Second Circuit Court of Appeals held that the Union had a right to such information even though a contract had been executed without its disclosure:

> Nor is our determination that the information was relevant affected by the subsequent execution of a

14. *Leland-Gifford Company, supra.*
15. *N.L.R.B. v. Leland-Gifford Company, supra.*
16. *Supra.*

> contract without disclosure. The most that can be inferred from the Union's action is that the advantages of a contract in hand outweigh those which the Union might later obtain when all relevant information would be available to it.

In the twenty years since the Board was first established and entrusted with the function of administering this Act, no Board or court decision has found a waiver of the Union's right to such information on the ground that the Union was able to secure some, but not all, of the necessary information through voluntary agreement of the employer; rather such a doctrine has been specifically rejected by Courts of Appeal. Information of this nature is the essential means by which a Union may become sufficiently informed to bargain about substantive matters in discharging its duties under Section 9 (a) of the Act as the bargaining representative of these employees. We do not believe that the Board should deprive a union of so vital an instrument to effectuate this statutory purpose. We would not do so unless the union in clear and unequivocal language had agreed, as it has not in these cases, to waive its right under the statute. We believe it too late in the day to ignore or overrule all judicial authority on this doctrine.

In his concurring opinion Member Leedom takes the position that he would dismiss the complaint without considering whether or not the Union had waived its right to the information requested. He cites neither Board nor court decisions in support of his conclusion that "the employer's failure to supply information is not failure to bargain in good faith." That conclusion is, we believe, contrary to long established law in this area of labor relations, including the most recent decisions of the First, Second, Fourth and Fifth Circuit Courts of Appeal.

It appears to be Member Leedom's position that the Employer was not required to supply the data requested on the grounds (1) the Union's request for information was not timely with respect to the wage reopening clause; (2) the Union failed to establish a "specific need" for the data. A third phrase, "the absence of apparent necessity at the time of the request," would seem to be included in the two grounds already stated.

As set forth in the Intermediate Report, the information requested by the Union related to the names, salaries, and merit increases of the employees it represented. We do not understand Member Leedom's decision as challenging the relevancy of this information to bargainable issues; nor does he dispute the settled precedents cited above, holding that a union has a statutory right to such information. He exonerates the Employer from failure to cooperate in collective bargaining because, it appears, the Union did not ask for the information at a time when it needed it for bargaining purposes. The record shows that the 1953-1955 contract contained a provision permitting either party to reopen the contract on the issue of wages on or before February 21, 1954. It is apparently this reopening clause to which Member Leedom refers when he finds that the Union's request for wage information on September 9, 1953, some five months before the contract could be reopened, was "not timely." We have, we believe, reviewed every Board and Court case involving the issue of an employer's duty under Section 8 (a) (5) of the Act to furnish information data to a union representing its employees. As indicated above, numerous and varied defenses have been raised by employers to support their refusal to supply such information. In only one of those cases, however, has the defense been specifically raised that a union's request for information was not timely because it was made some months before actual contract negotiations were to begin. That case is *Hastings & Sons Publishing Company.*[17] There

17. *Supra.*

the contracts in issue were to terminate on April 6, 1952. The union originally requested information on July 13, 1951, and the employer refused the request on August 17, 1951. The Board affirmed the Trial Examiner's rejection of the Respondent's contention that requests for information would be timely only if made during the 60 day period prior to the termination of the contract:

> Nor do I find merit to the Respondent's contention that the requests for information were inappropriate and proper only during the 60 days prior to the termination of the contract, since such information at reasonable times during the contract year would enable the Union as the statutory bargaining representative to determine whether the contract is being fairly and impartially administered. The policing of an agreement is an essential function of the Union.[18]

The rarity of defenses of this nature becomes understandable upon examination of the leading decisions dealing with this issue. On June 6, 1955, the First Circuit Court of Appeals handed down its decision in *Boston-Herald Travelers Corporation v. N.L.R.B.*[19] The court in that case quoted as the rule "consonant with and best calculated to effectuate the purpose of the Act" that set forth in the concurring opinion of Chairman Farmer in the *Whitin*[20] case, in which he held:

> . . . I would, therefore, hold that, short of evidence that union requests for wage data are used as an harassing tactic and not in a good faith effort to secure pertient bargaining information, the employer has a continuing obligation to submit such data upon request to the bargaining agent of his employees . . . . I am convinced, after careful consideration of the import of the problem on the collective bargaining process, that this broad rule is necessary to avoid

18. *Ibid*, at page 715.
19. 223 F. 2d 58 (C. A. 1).
20. *Supra*, at page 1541.

> the endless bickering and jockeying which has heretofore been characteristic of union demands and employer reaction to requests by unions for wage and related information. The unusually large number of cases coming before the Board involving this issue demonstrates the disturbing effect upon collective bargaining of the disagreements which arise as to whether particular wage information sought by the bargaining agent is sufficiently relevant to particular bargaining issues. *I conceive the proper rule to be that wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective bargaining agreement.* (Emphasis supplied.)

In *N.L.R.B. v. New Britain Machine Company*[21] the Second Circuit Court of Appeals affirmed the Board's finding that the employer had violated Section 8 (a) (5) of the Act by refusing to furnish data to a union. In that case the Board affirmed the Trial Examiner's holding:[22]

> Unless the information is 'plainly irrelevant' [Citing *Yawman & Erbe Mfg. Co., supra*] it must be submitted. The information has been held essential and relevant not only in the negotiation of wage questions, but also to protect the Union's 'proper interest in the manner in which an employer administers an existing contract,' and for 'policing' it. [Citing *Leland Gifford Co., supra; California Portland Cement, supra.*]

In the *Whitin*[23] case the Fourth Circuit Court of Appeals cited with approval the Board's decision. The quoted portion included the Board majority's agreement with the concurring opinion of Chairman Farmer:

> . . . In this respect, we agree with the statement of our concurring colleague, that in these cases it is suffi-

21. 210 F. 2d 61 (C. A. 2).
22. *New Britain Machine Company*, 105 NLRB 646, 650.
23. *Supra.*

> cient that the information sought by the union is related to the issues involved in collective bargaining, *and that no specific need as to a particular issue must be shown.* (Emphasis supplied.)

Again, on April 6, 1955, the Fifth Circuit Court of Appeals held in *N.L.R.B. v. The Item Company*[24] as follows:

> We agree with the Fourth Circuit in the *Whitin* case, *supra,* that wage data appropriate for disclosure to a statutory bargaining representative in such instances 'should not necessarily be limited to that which would be pertinent to a particular existing controversy' . . ., but includes all information, such as that here sought, which appears reasonably necessary for 'the policing of the administration of any contract.' [Citing *N.L.R.B. v. Leland-Gifford Co., supra.*]

The above cases are illustrative of the well settled rule, appearing in numerous cases throughout the history of the Board, that a union may request and an employer is obliged to furnish necessary information data *before, during or* after actual contract negotiations so long as the information is relevant to bargainable issues or policing the contract. In its letter of September 9 the Union stated that the information was requested in order "to police the existing contract, bargain intelligently, and evaluate properly our own and management's wage proposals." We believe that the Union's need for the information at the time it was requested is apparent on both grounds although, as the cases indicate, it is sufficient that the information was required to police the existing contract. The Respondent was asked to furnish the information by October 15, 1953. Certainly, four months is not too long a period to study the facts, hold membership meetings, and marshall arguments in support of ultimate bargaining positions.

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24. *Supra*

We are convinced, for the reasons set forth above, that there was neither a waiver by the Union of its right to the information requested, as Chairman Farmer and Member Rodgers find, nor was the request untimely, as Member Leedom finds. We therefore dissent.

Dated, August 26, 1955, Washington, D. C.

ABE MURDOCK, *Member*

IVAR H. PETERSON, *Member*

NATIONAL LABOR RELATIONS BOARD